The Litigation Section
of The State Bar of California

CALIFORNIA LITIGATION:

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By Russell Leibson

— Arbitration —

This issue is my last as Editor- in-Chief. Executive Editor Elizabeth Humphreys now takes over the reins. I know that we are in good hands. I want to take this opportunity to thank all of the contributors to the journal, and to commend the members of the Editorial Board for making my term a pleasurable and challenging one.

The Honorable William F Rylaarsdam examines pitfalls in drafting ADR clauses. He cautions that before entering into any agreement for alternative dispute resolution, counsel must understand the differences among the various procedures and the differing scopes of judicial and appellate review, advise their clients of these distinctions and the consequences flowing from them, and draft their agreements with precision.

Michael G. Ornstil offers some valuable tips on effective advocacy from the arbitrator's perspective. In his view, clearly specifying the evidentiary and procedural ground rules in advance of the hearing, utilizing preliminary conferences with the arbitrator, making a concise opening statement, judicious use of objections to evidence and offers of proof, and suggesting an appropriate award are the keys to impressing the arbitrator.

William N. Hebert addresses the current state of classwide arbitrations. He forecasts that if the recent trend favoring insertion of arbitration clauses in adhesion contracts continues, more and more class actions will be resolved by arbitration. One of the thorny unresolved issues raised by arbitration of class actions is the extent to which absent class members are bound.

Robert S. Arns gives a spirited retort to Jeffrey Calkins' article, published in our last issue, on the peculiar risk of harm doctrine. In his view, the demise of the doctrine dealt a severe blow to work place safety in California.

Ruth V Glick discusses the unconscionability defense to enforcement of arbitration agreements. Until the California Supreme Court further clarifies this area of the law, she opines that the prudent path is to avoid arbitration agreements that impose excessively one-sided terms favoring the stronger party in adhesion contracts.

Patricia N. Kopf considers the unsettled state of the law regarding enforceability of employer-employee arbitration agreements and proposes some useful guidelines for both employers and employees.

Elizabeth Humphreys looks at recent challenges to binding arbitration. She predicts a trend toward increasing judicial involvement in arbitration to protect consumers, and a concomitant erosion of "binding" arbitration.

Eugene J. Egan and *Carina M. Verano* provide suggestions on customizing a binding arbitration to maximize a successful outcome. In their view, careful thought and planning must go into selecting the arbitrator, crafting stipulations governing the admissibility of evidence, and the procedural rules governing the arbitration.

The Honorable William C. Harrison's Judicial Opinion examines the use of judicial arbitration as a settlement and cost recovery tool. He keenly points out that as courts rely more and more on judicial arbitration as a tool to resolve cases, parties and their attorneys need to take the process seriously, participate vigorously, and reject arbitration awards and statutory offers to compromise sparingly.

— Looking Ahead —

Our next issue, "Year 2000," takes a special look at the changing dynamics of litigation practice. We will feature articles on the future of the courts, torts of the 21st century, the role of technology in law practice and the courts, the appellate task force, and a host of other issues.

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The journal is sent free to members of the Litigation Section.

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